THE AYER MOLEK RUBBER COMPANY BHD A

v.

BINTANG-BINTANG SDN BHD

COURT OF APPEAL, PUTRAJAYA B
MOHAMED APANDI ALI JCA
LINTON ALBERT JCA
HAMID SULTAN ABU BACKER JCA
[CIVIL APPEAL NO: J-02-1279-06-2012]
22 MARCH 2013 C

COMPANY LAW: *Winding-up - Stay of order - Sale of property - Sale and transfer of company's land during period of stay of winding-up order - Whether transaction valid - Companies Act 1965, s. 223*

The respondent had sold a parcel of its land ('the land') to the appellant. The sale price was fully paid and the land was transferred into the appellant's name. During the process of the sale, a winding-up order ('the order') was made against the respondent but it obtained from the High Court a stay of the order ('17 May 2006 stay order') pending the disposal of its appeal to the Court of Appeal against the order. The respondent had also obtained the consent of the Department of Insolvency to complete the sale and transfer of the land. The sale was fully completed and the transfer was done during the validity period of the 17 May 2006 stay order. Several months after the sale was completed, the Court of Appeal heard and dismissed the appeal against the order and set aside the 17 May 2006 stay order. About a year later, the respondent obtained a permanent stay of the winding-up order from the High Court ('8 August 2008 stay order'). The new directors of the respondent filed an action in the High Court to, *inter alia*, declare the above transfer of the land as void. It was alleged, *inter alia*, (i) that the appellant had fraudulently and dishonestly conspired with the then directors of the respondent (the second, third, fourth and fifth defendants) to cheat and defraud the company; (ii) that the sale was at an undervalued price; (iii) that the sale was not approved at the general meeting of the respondent or by a valid board of directors' resolution; and (iv) that the then directors had breached their fiduciary duties to the company. Fraud was also alleged on the part of the seventh defendant, who was the solicitor who acted for the appellant in the sale, while the sixth defendant, who acted as the respondent's agent in the transaction, was alleged to be not

D E F G H I

a registered estate agent. Holding, *inter alia,* that the allegations of fraud and conspiracy were not proved, that the respondent did not suffer any loss and that the land was sold at proper value, the High Court dismissed the respondent's claims against all the defendants except the appellant. As against the appellant, the court, *inter alia,* declared the transfer of the land to be unlawful and invalid. It held that as the 8 August 2008 stay order did not operate retrospectively, the events transacted by the respondent prior to that date and after the presentation of the winding-up petition, including the sale and transfer of the land, were rendered illegal, null and void under s. 223 of the Companies Act 1965 ('the CA'). The court allowed the appellant's counterclaim for the refund of the purchase price and for the respondent to reimburse it for the value of improvements done to the land. The appellant appealed to the Court of Appeal against that part of the High Court's decision declaring the sale and transfer of the land to be void.

Held (allowing appeal with costs; setting aside High Court's decision)

Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) The transfer of the land was validly done when the 17 May 2006 stay order was still effective. The transfer was registered during the period of the first stay order and therefore, s. 223 of the CA was not operative at all. (para 20)

(2) The trial judge had omitted in his judgment to deal with the 17 May 2006 stay order and, in consequence, the integrity of the decision-making process was compromised on that issue. (para 20)

(3) Since a stay order does not have retrospective effect, the court, when granting the stay, was obliged to consider the events from the date the winding-up petition was filed until the date of the stay, including any issues which had to be dealt with under s. 223 of the CA. If stay was granted, it could be on terms. The parties to a stay application must be vigilant to obtain the relevant terms. When the court was minded to grant stay, it would be prudent to ensure that past acts of the company after the commencement of the winding-up had been regularised to ensure no disputes, such as in the instant case, would arise. (para 20)

Bahasa Malaysia *Translation Of Headnotes*

Responden telah menjual sebidang tanahnya ('tanah tersebut') kepada perayu. Harga jualan telah pun dibayar sepenuhnya dan tanah tersebut telah dipindah milik ke atas nama perayu. Semasa proses penjualan tersebut, satu perintah penggulungan ('perintah tersebut') telah dimasukkan terhadap responden tetapi ia memperolehi perintah penangguhan dari Mahkamah Tinggi ('perintah penangguhan 17 Mei 2006') sementara menunggu keputusan rayuannya dari Mahkamah Rayuan terhadap perintah tersebut. Responden juga telah memperolehi persetujuan dari Jabatan Insolvensi untuk menyelesaikan jualan dan pindah milik tanah tersebut. Jualan tersebut diselesaikan sepenuhnya dan pindah milik dibuat semasa tempoh kesahan perintah penangguhan 17 Mei 2006. Beberapa bulan selepas jualan tersebut diselesaikan, Mahkamah Rayuan telah mendengar dan menolak rayuan terhadap perintah tersebut dan mengenepikan perintah penangguhan 17 Mei 2006. Selepas kira-kira setahun kemudian, responden memperoleh penangguhan tetap perintah penggulungan dari Mahkamah Tinggi ('perintah penangguhan 8 Ogos 2008'). Pengarah-pengarah baru responden memulakan tindakan di Mahkamah Tinggi untuk, antara lain, mengisytiharkan bahawa pindah milik tanah tersebut kepada perayu adalah tidak sah. Adalah didakwa, antara lain, (i) bahawa perayu, secara frod dan tidak jujur, telah bersubahat dengan pengarah-pengarah responden pada masa itu (defendan-defendan kedua, ketiga, keempat dan kelima) untuk menipu dan melakukan frod terhadap syarikat tersebut; (ii) bahawa jualan tersebut adalah pada nilai yang rendah; (iii) bahawa jualan tersebut tidak diluluskan semasa mesyuarat agung responden atau melalui resolusi lembaga pengarah yang sah; dan (iv) bahawa pengarah-pengarah pada masa itu telah melanggar kewajipan fidusiari mereka terhadap syarikat tersebut. Frod juga didakwa dilakukan oleh defendan ketujuh, yang merupakan peguamcara yang bertindak bagi pihak perayu dalam jualan tersebut, sementara defendan keenam, yang bertindak sebagai ejen responden dalam transaksi tersebut, didakwa bukan ejen hartanah yang berdaftar. Memutuskan, antara lain, bahawa dakwaan-dakwaan frod dan persubahatan tidak dibuktikan; bahawa responden tidak mengalami apa-apa kerugian dan bahawa tanah tersebut dijual pada nilai yang berpatutan, Mahkamah Tinggi menolak tuntutan responden terhadap kesemua defendan kecuali perayu. Terhadap perayu pula, mahkamah, antara lain, mengisytiharkan bahawa pindah milik tanah tersebut adalah menyalahi undang-undang dan tidak sah. Ia memutuskan bahawa memandangkan perintah penangguhan 8 Ogos 2008 tidak berjalan

secara retrospektif, perkara-perkara yang dikendalikan oleh responden sebelum tarikh tersebut dan selepas pengemukaan petisyen penggulungan, termasuk jualan dan pindah milik tanah tersebut, salah dari segi undang-undang, batal dan tidak sah di bawah s. 223 Akta Syarikat 1965 ('Akta'). Mahkamah membenarkan tuntutan balas perayu bagi pemulangan harga belian dan bagi responden membayar balik nilai pembaikan yang dilakukan pada tanah tersebut. Perayu merayu ke Mahkamah Rayuan terhadap bahagian keputusan Mahkamah Tinggi tersebut yang mengisytiharkan jualan dan pindah milik tanah tersebut adalah batal.

Diputuskan (membenarkan rayuan dengan kos; mengenepikan keputusan Mahkamah Tinggi)

Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Pindah milik tanah tersebut dilakukan dengan sah apabila perintah penangguhan 17 Mei 2006 masih berkuatkuasa. Pindah milik tersebut didaftarkan dalam tempoh perintah penangguhan pertama dan dengan itu, s. 223 Akta langsung tidak berkuatkuasa.

(2) Hakim bicara dalam penghakimannya telah gagal membicarakan perintah penangguhan 7 Mei 2006 dan, akibatnya, integriti proses pembuatan keputusan terjejas dalam isu tersebut.

(3) Memandangkan perintah penangguhan tidak mempunyai kesan retrospektif, mahkamah, apabila membenarkan penangguhan, mempunyai tanggungjawab untuk mempertimbangkan perkara-perkara dari tarikh petisyen penggulungan difailkan sehingga tarikh penangguhan, termasuk apa-apa isu yang perlu disentuh di bawah s. 223 Akta. Jika penangguhan dibenarkan, ia adalah berdasarkan terma-terma yang relevan. Pihak-pihak kepada permohonan penangguhan mesti berjaga-jaga dalam memperoleh terma-terma yang relevan. Apabila mahkamah bersetuju membenarkan penangguhan, adalah bijak bagi memastikan tindakan-tindakan terdahulu syarikat selepas permulaan penggulungan diputuskan untuk memastikan tidak timbul pertikaian seperti dalam kes ini.

Case(s) referred to:

Alghussein Establishment v. Eton College [1991] 1 All ER 267 ***(refd)***

Alliance Bank Malaysia Berhad v. W Shalihudin W Ibrahim [2012] 1 LNS 151 HC ***(refd)***

Central Securities (Holdings) Bhd v. Haron Mohamed Zaid [1978] 1 LNS 20 FC ***(refd)***

Jardio Holdings PTY Ltd v. Dorcon Construction PTY Ltd [1984] 3 FCR 311 ***(refd)***
Krextile Holdings Pty Ltd v. Widdows [1974] VR 689 ***(refd)***
New Zealand Shipping Company Limited v. Societes Des Ateliers Et Chantiers De France [1919] AC 1 PC ***(refd)***
Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd [1999] 3 CLJ 577 CA ***(refd)***
Re Clifton Place Garage Ltd [1969] 3 All ER 892 ***(refd)***
Re Steane's (Bournemouth) [1950] 1 All ER 21 ***(refd)***
Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham [1998] 4 CLJ 812 CA ***(refd)***
Tiong Hung Ming v. Kalimantan Hardwood Sdn Bhd; Weeluk Holding Sdn Bhd (Applicant) [2008] 9 CLJ 593 HC ***(refd)***
Tradebond (M) Sdn Bhd v. Halim-O Construction Sdn Bhd [2005] 7 CLJ 93 HC ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 223, 243
National Land Code, ss. 214(A), 340(1)

Other source(s) referred to:
Palmer's Company Law, 21st edn, p 770

For the appellant - M Pathmanathan (Shanti Pathmanathan & Shirin Pathmanathan with him); M/s M Pathmanathan & Co
For the respondent - SK Sivam (Izzat Othman with him); M/s PG Lim & Co

[Editor's note: For the High Court judgment, please see The Ayer Molek Rubber Company Bhd v. Bintang-Bintang Sdn Bhd & Ors [2013] 3 CLJ 543.]

Reported by Ashok Kumar

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] This is our judgment in respect of the appellant/first defendant's appeal to set aside a part of the order of the High Court only, which came for hearing on 25 February 2013 and on the same day we allowed the appeal. My learned brothers Mohamed Apandi bin Haji Ali JCA and Linton Albert JCA have read the draft judgment and approved the same. This is our judgment.

[2] The respondent/plaintiff's claim in essence was to seek a declaration that the transfer of its land to the appellant is void *ab initio* in consequence of winding-up proceedings.

[3] One of the crucial section to determine in this appeal is s. 223 of the Companies Act 1965 ('CA 1965') and the scope of s. 243 of the CA 1965. The said sections read as follows:

> **Section 223: Avoidance of dispositions of property, etc.**
>
> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.
>
> **Section 243: Power to stay winding up.**
>
> (1) At any time after an order for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

[4] At the outset we must say that s. 243 of the CA 1965 itself does not prohibit the court while granting the stay to make any relevant orders which may be necessary and essential under s. 223 of the CA 1965. And no authorities from respected jurisdiction were furnished to say otherwise. In addition on the factual matrix of the case s. 223 will not apply.

[5] At the commencement of the appeal, we posed a question to both the learned counsel whether any disposition of the property after the commencement of winding-up is void and a nullity or can be saved by the court. Both counsels agree the court has the final say. It must not be forgotten that all illegal agreements are void and court will not condone illegal agreements. However, all void agreements are not necessarily illegal.

Brief Facts

[6] The respondent sold a parcel of land to the first appellant. The sale price has been fully paid and the land transferred. The new directors of the respondent had brought the action against the first defendant as well as second to fifth defendants who were previous directors at the time of the sale and transfer. The sixth defendant was the agent appointed by the respondent to dispose of the said land. And the seventh defendant is the solicitor acting for the appellant in respect of the sale.

[7] The learned trial judge upon hearing the parties made the following orders: A

(a) the claim against the fourth defendant is dismissed with costs of RM10,000;

(b) the claim against the fifth defendant is dismissed with cost of RM10,000; B

(c) the claim against the second, third and sixth defendants is dismissed with no order as to costs;

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(d) the claim against the seventh defendant is dismissed with costs of RM12,000;

(e) the claim against the first defendant is allowed on the following terms:

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(i) a declaration that the land was unlawfully transferred to the first defendant and the transfer is invalid and of no effect.

(ii) order directing the Registrar/Land Administrator, Johor to cancel the MOT and to replace the name of the plaintiff as the proprietor of the land; E

(iii) order that subject to item (f) below, the first defendant forthwith take all steps necessary to transfer the land to the plaintiff; F

(iv) an injunction to restrain the first defendant or their agents or servants from dealing with the land by way of transfer or in any manner whatsoever;

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(v) damages to be assessed by the Deputy Registrar;

(vi) liberty to apply; and

(vii) costs of RM30,000.

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(f) in respect of the first defendant's counterclaim,

(i) the plaintiff refund to the first defendant the purchase price of RM12,087,000; and

(ii) the plaintiff reimburse the first defendant for the value of the improvement and infrastructure, if any, made to the land, such amount to be assessed by the Deputy Registrar. I

[8] The respondent/plaintiff's claim in the High Court has been summarised by learned counsel for the appellant as follows:

(a) The respondent's directors had acted in breach of their fiduciary duties, fraudulently and dishonestly conspired with the appellant;

(b) Fraud on the part of the appellant in wrongfully, dishonestly and fraudulently conspiring with the second, third and fourth defendants to cheat and defraud the respondent;

(c) The sale of the said land was at an undervalued price;

(d) There was no valid board of directors' resolution of the respondent approving the sale and transfer of the land to the appellant;

(e) The sale was not approved by the general meeting of the respondent;

(f) The respondent ought to have known that the sixth defendant was not a registered estate agent;

(g) Fraud on the part of the seventh defendant; and

(h) A winding-up order was made against the respondent on 13 April 2006 which was stayed on 17 May 2006 until the disposal of the appeal on 21 September 2007. On 8 August 2008 there was a permanent stay of the winding-up order.

[9] There were two stay orders pursuant to s. 243 of the CA 1965. The first stay order was granted on 17 May 2006 pending appeal to the Court of Appeal against the winding-up order. The appeal was dismissed on 21 September 2007 and in consequence the stay lapsed. The second stay order was secured with the knowledge of relevant parties on 8 August 2008.

[10] It must be noted here that the stay order dated 17 May 2006 does not state that the company is prohibited from disposing of the said land until the disposal of the appeal. In fact all relevant parties were aware of the disposal or proposed disposal which had commenced as early as May 2005. In addition there is no prohibition in law more so under s. 223 of the CA 1965 to include such a term when a stay under s. 243 of the CA 1965 is made. In this case that was not done but the solicitors for the respondent attempts to distinguish the stay under s. 243 pending appeal as a temporary stay and in consequence argues there

cannot be a disposal during that period, but did not furnish any authority on point. We will deal with this issue later in the judgment.

[11] The respondent's prayer in the amended statement of claim reads as follows:

(a) an order that the private caveat Presentation No. 12979/2009 filed by the Plaintiff on the 711 acres of land held under Grant for Land 92575, Lot 2203 Mukim Buloh Kasap, District of Segamat, State of Johor remain on the register until the final disposal of this suit;

(b) a declaration that the Sale & Purchase Agreement dated 12.4.2006 between the Plaintiff Company and the 1st Defendant is void *ab-initio* and be set aside;

(c) a declaration that the lands belonging to the Plaintiff ie, agricultural land planted with oil palm measuring 711 acres under Grant for land 92575 Lot 2203 Mukim Buloh Kasap, District of Segamat, State of Johor was unlawfully and fraudulently transferred to the 1st Defendant and said transfer is invalid and is of no effect;

(d) a declaration that the Memorandum of Transfer in respect of the said land held under Grant for Land 92575, Lot 2203 Mukim Buloh Kasap, District of Segamat, State of Johor executed by the 2nd and 3rd Defendants in favour of the 1st Defendant and registered in the Register of Titles on 27.6.2006 was fraudulent, null and void and is of no effect;

(e) An order directing the Registrar/Land Administrator, Johor to cancel the Memorandum of Transfer and to replace the name of the Plaintiff as the proprietor of the land held under Grant of Land 92575, Lot 2203 Mukim of Buloh Kasap, District of Segamat, State of Johor;

(f) An order that the 1st Defendant forthwith take all steps necessary to transfer the 711 acres of land held under Grant for Land 92575, Lot 2203, Mukim of Buloh Kasap, District of Segamat, State of Johor to the Plaintiff Company;

(g) An injunction to restrain the 1st Defendant or their agents and/or servants from dealing with the said land held under Grant for Land 92575, Lot 2203 Mukim of Buloh Kasap, District of Segamat, State of Johor by way of transfer or in any manner whatsoever;

A (h) An order that the 6th Defendant refund the Plaintiff the sum of RM362,610.00 commission paid by the Plaintiff Company with interest thereon at 8% per annum from 22.4.2006 to date of payment;

B (i) An order that the 6th Defendant refund/repay Plaintiff the sums of RM40,000.00 paid on 5.6.2006 and RM150,000.00 paid on 27.7.2007 with interest on the said sums at 8% per annum from 6.6.2006 and 28.7.2006 respectively;

C (j) In the interim an order that an independent Estate Management Contractor (EMC) be appointed to manage the estates on the said land until the final disposal of this suit and said EMC to render accounts to the Plaintiff/1st Defendant during such period;

(k) Damages;

D (l) Costs;

(m) The Plaintiff may have liberty to apply;

(n) Such further or other orders that this Honourable Court may deem fit.

E **[12]** There were two principal issues for the determination of the trial court. It can be summarised as follows:

(i) whether the sale was effected by the fraud, dishonesty and
F conspiracy of the defendants;

(ii) whether the sale was valid when it was effected during the period after the presentation of winding-up petition and after a winding-up order has been made.

G **[13]** The learned judge at p. 28 of his judgment had stated that the first issue is a question of fact and the second issue is a question of law (see p. 47). We are in total agreement and in fact there is no appeal in respect of the first issue and the appeal is only in respect of the second issue. On the first issue the finding
H of the learned judge *inter alia* reads as follows:

> On the totality of the evidence adduced at trial, the Court is not satisfied that there is any evidence upon which to infer an intent of fraud or conspiracy on the part of the 1st to 7th Defendants. There is no evidence of any agreement between the defendants to
I carry out the alleged fraud. Whilst their actions may not have been lawful, there is no element of fraud. Further, there is no evidence to show that the Plaintiff suffered any loss. The purchase

> price for the Land was not unusual in the circumstances as it is consistent with the value assessed by the Government Valuation Department. In addition, the purchase price had already been paid for in full. In the premises, the charge of fraud and conspiracy has not been made out beyond reasonable doubt. By reason of the foregoing, the question is answered in favour of the Defendants.

[14] In consequence the learned judge had dismissed the claim against the second to seventh defendants and had held that under s. 340(1) of the National Land Code, the appellant's title is indefeasible and free from all adverse claims or encumbrances.

[15] On the second issue, the learned judge *inter alia* had stated as follows:

> Applying the aforesaid principles to the present case, as a consequence of the payment stay order dated 8.8.2008 the whole effect of the winding-up ceases and the Plaintiff company can thereon carry on its business activities and operations as if no winding-up order existed. How does this affect the impugned events? It is this - a stay order only becomes operative from the date of the stay order. In other words, a stay order has no retrospective effect. It only takes effect from the date it was made. Accordingly, the effect of the permanent stay order is this – from 8.8.2008 onwards the Plaintiff's company may carry on its business and operations 'as if no winding-up order existed'. It does not mean that the winding-up order never existed or that the winding-up order has been set aside or revoked. The winding-up order is still in existence. It only became inoperative from 8.8.2008 onwards. In short, the permanent stay order relates only to events which were transacted by the plaintiff company from 8.8.2008 onwards. It does not relate back to events which took place prior to 8.8.2008.

The Federal Court in *Central Securities (Holdings) Bhd v. Haron Mohamed Zaid* [1978] 1 LNS 20; [1979] 2 MLJ 244 cautioned against too readily invalidating contracts when dealing with statutes regulating commercial transactions. Raja Azlan Shah CJ (as HRH he then was) had this to say:

> We bear in mind the much quoted and common sense warning by Devlin J. in *St. John Shipping Corporation v. Joseph Rank Ltd* against a too-ready assumption of illegality or invalidity of contacts when dealing with statutes regulating commercial transactions.

[16] Learned counsel for the appellant complains that the learned judge erred in law when he only dealt with the stay order granted on 8 August 2008 which is not relevant to the facts of the case and failed to consider and give effect to the stay order granted on 17 May 2006 which was operative during the presentation and registration of the transfer of the said land, in favour of the appellant.

[17] Learned counsel for the appellant also says:

(i) two weeks after the winding-up order was made, the Department of Insolvency had given its written sanction and consent to continue and complete the sale of the land;

(ii) when the stay was granted on 17 May 2006 the Official Receiver was present and did not oppose the application;

(iii) the new Board of Directors' cannot renege or resile of a *bona fide* transaction of the company;

(iv) the company and/or Board of Directors cannot rely on its own breach or take advantage of its own wrong doing. (see *New Zealand Shipping Company Limited v. Societes Des Ateliers Et Chantiers De France* [1919] AC 1 PC; *Alghussein Establishment v. Eton College* [1991] 1 All ER 267; *Pentadbir Tanah Daerah Petaling v. Swee Lin Sdn Bhd* [1999] 3 CLJ 577).

(v) the first stay order which lapsed on 20 September 2007 upon the Court of Appeal dismissing the respondent's appeal against the winding-up order cannot invalidate transactions which were done during the time the first stay was in force. It only meant that the stay has no further effect and force from the date of its lapse.

(vi) it was plainly wrong for the learned judge to have ruled that since the stay order was set aside on 20 September 2007. There was effectively no stay order and in consequence the events that took place after the stay order are rendered null and void.

(vii) the learned judge erred in completely ignoring or failing to address the temporary stay order dated 17 May 2006 which remained in effect till 20 September 2007. The learned judge only addressed it to the effect of the permanent stay from 8 August 2008 onwards. In fact the transfer of the said land to the appellant was completed during the lifespan of the

temporary stay between 17 May 2006 and 20 September 2007. Nothing relevant or material to the transaction happened after 20 September 2007. This is clearly borne within the chronology set out with by the learned judge on the grounds of judgment.

(viii) plainly wrong for the learned judge to hold the impugned events relating to the sale as illegal and void for breach of s. 223.

[18] It is also pertinent to note the appellant's submission which reads as follows:

> The Respondent's submissions that the approval of the Court was not obtained is not only contrary to the facts but misleading. In making the application for a stay supported by the affidavit of the Respondent's authorized representative stating all the relevant facts pertaining to the sale and exhibiting the SPA the Respondent themselves moved the Court for the approval/sanction of the Court of the SPA and the transfer of the said Land to the Appellant. The Stay Order had the effect of and enabled the Respondent to carry out and continue with its business as if there was no Winding-Up Order. The contributories wanted it and the Petitioning Creditor's interest was also secured by the full payment of the judgment sum into Court, which was from the first 30% the Appellant paid towards part payment of the purchase price of the said Land. The Court recognized and accepted that the sale of the said Land to the Appellant was for the benefit of the Respondent and its creditors.
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> These documents are the Respondent's own court documents which the Respondent was duty-bound to have disclosed. By only disclosing the Stay Order and suppressing the affidavit in support the trial Court was led to believe that there was no validation and sanction under s. 223 of Companies Act 1965 for the sale and transfer of the Land to the Appellant. This was the principal issue for determination. The Respondent's non-disclosure of these documents is a grave and serious omission that impairs the administration of justice which is punishable with contempt. [See *Cheah Cheng Hoc v. Public Prosecutor* [1986] 1 MLJ 299 FC].
>
> (i) It is clear that the learned judge was misled on an important matter that is the concealment of a document so as to effect the credibility of the witness even though it did not directly relate to the issue in the action.

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> It is very important for a counsel to remember that whatever may be his duty to his client his duty to the court remains paramount in the administration of justice. (p. 301) per Lee Hun Hoe CJ.

B

The Respondent's callous submissions that the Court did not authorize the sale flies in the face of the Respondent's own conduct in filing the stay application and its sworn supporting affidavit file in a court of law and is a gross misrepresentation of the true facts.

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Clearly the Respondent is stopped from challenging the validity of the sale and the authenticity of the Official Receiver's letter of consent which the Respondent procured, delivered to the Appellant to induce the Appellant to pay the balance of the purchase price.

D

The stay application and affidavit in support are crucial and material documents in the Respondent's possession which ought to have been disclosed at the trial. Instead they were suppressed. The Respondent only disclosed the Stay Order but not the application and affidavit in support thereof.

E

These are Court documents which show that the High Court addressed its mind to the SPA between the Appellant and Respondent and validated and sanctioned the sale and transfer. The Stay Order refers to the Respondent's Affidavit dated 2 May 2006. The Honourable Court can take judicial notice of these documents.

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(i) These documents are the Respondent's court documents/ sworn by the Respondent – thereof no surprise or prejudice.

(ii) s. 57 Evidence Act 1950;

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(iii) "Judicial notice can be taken of matters relating to pending or past legal proceedings. This is because a legal proceeding is a matter of public knowledge." Per Augustine Paul p. 531, Evidence Practice and Procedure (3rd ed.) by Augustine Paul.

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(iv) (a) "Judicial notice takes the place of proof and is of equal force. As a means of establishing facts it is therefore superior to evidence." p. 888, Sarkar's *Law of Evidence* vol. 1.

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(b) "The court is entitled to look at its own records and proceedings in any matter and take notice of their contents although they may not be formally brought before the court by the parties." p. 888, Sarkar's *Law of Evidence* vol. 1.

(c) "Taking judicial notice means that the court is itself duty-bound to hunt up the fact and apply it even though the parties or their counsel fail to product it." p. 905, Sarkar's *Law of Evidence* vol. 1.

(d) "Matters of judicial record are unquestionable." p. 1525, Sarkar's *Law of Evidence* vol. 2.

It is therefore respectfully submitted that the sale was not void but approved sanctioned and validated by the Court under s. 223 of the Companies Act 1965.

Further and in any event upon the granting of the Winding-Up Order, the Official Receiver steps into the shoes of the Board of Directors and is empowered under section 236 of the Companies Act 1965 to carry out the activities of the Respondent.

Had there been no stay the OR having consented to the SPA would, as the duly authorized representative of the Respondent, in place of the directors, have executed the MOT and transferred the said Land to the Appellant.

However, as there was a stay and the control and management of the Respondent reverted to the Board of Directors, the directors of the Respondent executed the MOT.

Therefore, it is respectfully submitted that the sale and transfer of the said Land was effected with the requisite approvals of all the relevant parties.

It is not proper for the new Board of Directors of the Respondent to come to Court and apply to set aside the transfer relying on their own alleged wrongdoings, ie, procuring a forged letter of consent from the Insolvency Department and failing to pass the necessary corporate resolutions (internal matters within their control).

[19] Learned counsel for the respondent says that transfer is void. We must say here that the issue as to whether it is void or not can only be determined by the court. It may be void but it cannot attract the jurisprudence relating to illegality and the concept of nullity *ab initio*. Section 223 is there to protect creditor, contributories and the relevant parties and if the Board of Directors after the commencement of the winding-up proceeding act in contrary to the law such transaction may be invalidated. And that section gives notice to third parties who intend and/or are dealing with the company to restrain from having any transaction's relating to disposal once the winding-up proceedings has commenced.

[20] We have read the appeal record, and the submission of the parties in detail. The court is grateful to the comprehensive submission. We do not wish to repeat the same save to deal with the core issues. After having given much consideration to the submission of learned counsel for the respondent, we take the view that the appeal must be allowed. Our reasons *inter alia* are as follows:

(a) It is well settled that any disposal of property after the commencement of the proceeding can be validated by the court before or after the winding-up order. It is also well settled that an order for validation under s. 223 of the CA 1965 will ordinarily be given if the transaction was made reasonably and in good faith for the benefit of the company or made honestly and in the ordinary course of business. Support for the proposition is found in a number of cases. To name a few are as follows: (i) *Re Clifton Place Garage Ltd* [1969] 3 All ER 892; (ii) *Re Steane's (Bournemouth)* [1950] 1 All ER 21; (iii) *Tradebond (M) Sdn Bhd v. Halim-O Construction Sdn Bhd* [2005] 7 CLJ 93; (iv) *Jardio Holdings PTY Ltd v. Dorcon Construction PTY Ltd* [1984] 3 FCR 311.

The learned author of *Palmer's Company Law*, 21st edn. at p. 770 had this to say:

> A disposition of the property of the company, including things in action and a transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up, is void unless the court otherwise orders (s. 227); but the practice of the court is to allow such payments or dispositions, pending the petition, if made honestly and in the ordinary course of business. [*Re Oriental Bank Corporation* [1884] 28 Ch. D 634; *Gorringe v. Irwell India Rubber Works* [1886] 34 Ch. D 128].
>
> The court has jurisdiction under section 227 to authorize a disposition of the company's property for the benefit of creditors, notwithstanding that a winding-up order has not yet been made. [*Re A.I. Levy (Holdings) Ltd.* [1964] Ch. 19; see also *Garden v. Albert Palace Assocn.* [1886] 56 LJ Ch. 166; *Re Douglas (Griggs) Engineering Ltd.* [1963] Ch. 19; *cf Re Miles Aircraft Ltd.* [1948] Ch. 188].

(b) Take for instance in this case if the appellant had made an application for validation (which we think for reasons stated below is not necessary) in all likelihood it will be given as it

was the finding of the court that the transaction in essence was *bona fide*. Even if the appellant by way of counterclaim has sought an order for validation in all likelihood it will be given, as a declaratory order is only a discretionary relief and based on the jurisprudence relating to discretion under the Specific Relief Act 1950, the court on the factual matrix case ought not to have granted the order in favour of the respondent, more so when the transaction was *bona fide* and the title has been perfected. (See *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham* [1998] 4 CLJ 812). There is no requirement under s. 223 of the CA 1965 for an application for validation to be made separately. The court can decide the issue at any time or during any relevant legal proceedings.

(c) From the reading of s. 223 it is clear that the status of the disposal can only be determined by the court. In practical terms even though the Act says it is void it is not void *ab initio* or nullity or illegal *per se*. The commercial reality is that there may be a number of transactions which would have escaped the court's scrutiny during the twilight period of commencement and winding-up which if challenged in court may be declared void. If not challenged it may pass as an ordinary transaction of the company. In consequence to say such a transaction is a nullity and cannot be cured as argued by the learned counsel for the respondent and accepted by the learned judge in our view is flawed. More so when the learned judge has found that the transaction in essence was *bona fide* and title has been perfected. The relevant part of the judgment on this issue *inter alia* reads as follows:

> By reason of the foregoing, the Court holds that the permanent stay order does not relate to the impugned events which transpired before 8.8.2008. Consequently, the impugned events are illegal, null and void for being made after the commencement of the winding-up by the court under s. 233 of the Act. It must therefore follow that the SPA and transfer of the Land to the 1st Defendant is void as it was effected during the period after the presentation of the winding-up petition and after the winding-up order has been made.

On the factual matrix of the case there was no obligation on the court to grant the declaratory relief which is purely discretionary. (See *Alliance Bank Malaysia Berhad v. W Shalihudin W Ibrahim* [2012] 1 LNS 151; [2012] 10 MLJ 374; *Central Securities* (*supra*)).

(d) Section 243 of the CA 1965 gives jurisdiction to stay the proceedings and if necessary **on terms** (emphasis added). Stay is not ordinarily granted as it has the effect of reviving the wound up company to proceed from the date the stay was granted and the company can thereafter resume the conduct of its business and affairs as if no winding-up order existed. (see *Krextile Holdings Pty Ltd v. Widdows* [1974] VR 689). In almost all cases the court will be reluctant to order a stay unless the justice of the case requires to do so and the strict requirements set out in the winding-up rules have been satisfactorily complied with, very importantly to protect the creditors and other relevant parties. In *Tiong Hung Ming v. Kalimantan Hardwood Sdn Bhd; Weeluk Holding Sdn Bhd (Applicant)* [2008] 9 CLJ 593, Hamid Sultan bin Abu Backer JC (as he then was) on s. 243 had this to say:

> Law On Stay Of Winding Up
>
> The learned author K.V. Padumanabha Ram in his book *Winding Up of Companies* - has put much thought into this area of law. It can be summarised as follows:
>
> (a) The CA 1965 or the Companies (Winding-up) Rules 1972 (CR 1972), contains no provision for setting aside or for rescinding a winding-up order made by the High Court and the judicial view on the question of having the power, inherent or otherwise, to do so is also not uniform. The foreign precedents also show conflicting views on this point. (see *Brindon New Zealand Ltd. v. Tent World Ltd.* [1992] 3 NZLR 725, *South African Syndicate Ltd* [1883] 28 SJ 152, *Blatt Ray Inc.* [1939] 20 CBR 447, *Samoana Press Co. Ltd.* [1987] 4 NZCLC 64).
>
> (b) Section 243 of the Act empowers the court to stay the winding-up proceedings. That discretionary power can be exercised at any time after an order for winding-up has been made, on an application of: (i) the liquidator; (ii) any creditor; or (iii) contributory. On proof to the satisfaction of the court that all proceedings in relation to the winding-up ought to be stayed, the court may make an order staying the winding-up proceedings either altogether or for a limited time on such terms and conditions as the court thinks fit. Before making any such order on an application for stay, the court may require the liquidator to furnish a report with respect to any facts or matters which in his opinion are relevant. The report of the liquidator, when it is called for by the

court, should reflect the fact that he has carried out a proper investigation into the affairs of the company and must make references to the company's book or audited accounts or make consultations with the principal officers of the company such as the auditor and the secretary. This he has to do before coming to a conclusion that the company is solvent. The liquidator is duty bound to place before the court all the relevant facts without any tinge of partiality. The report should also refer to the 'ugly side' of the company's affairs if any and also refer to the adverse effect of the stay on the person seeking it. An office copy of every order made under section 243 is to be lodged by the company with the registrar and also the official receiver within fourteen days after the making of the order and any failure to comply by the liquidator or had obtained judgment against the company in the civil suit, otherwise, it would remain a person 'claiming to be a creditor'.

(c) The normal practice which the courts have been following is not to grant a stay of the winding-up proceedings immediately after a winding-up order is made. (see *A & B.C Chewing Gum* [1975] 1 WLR 579).

In *Vijayalakshmi Devi Nadchatiram v. Dr. Mahadevan Nadchatiram & Ors* (*supra*), the Federal Court observed:

In summary, the principles which emerge from the above authorities are these:

(1) The granting of a stay under s. 243 of the Act is discretionary and the onus is on the party seeking a stay to make out a positive or sufficient case.

(2) The attitude of the creditors, contributories and the liquidator is a relevant consideration.

(3) That in exercising its discretion, the court will consider not only the interest of the creditors, but also whether it is conducive or detrimental to commercial morality and to the interests of the public at large.

(4) Last, and which by no means least, is that a stay will be refused if there is evidence of misfeasance or of irregularities demanding investigation.

(e) It is well settled that the order for stay does not have retrospective effect and it is clear that it has only prospective effect. Because it does not have retrospective effect the court

when granting the stay is obliged to consider the events from the date the winding-up petition was filed until the date of stay inclusive of any issues which have to be dealt with under s. 223 of the CA 1965. And if stay is granted it can be on terms. The parties to the stay application must be vigilant to obtain the relevant terms. For example, (i) in the instant case where the first stay was obtained pending appeal, a term could have been incorporated in the order that the company be restrained from disposing of its landed property; (ii) to validate any of its transactions from the date of commencement of winding-up proceedings until the interlocutory or final stay is granted. We will go to the extent of saying when court is minded to grant the stay it will be prudent to ensure that the past acts of the company after the commencement of the winding-up has been regularised to ensure no disputes as the instant case will arise.

(f) In the instant case we do not think a validation order is necessary as the transfer of the property was validly done when the first stay dated 17 May 2006 was effective. In fact attempt to sell the property had commenced as early as 5 May 2005. The memorandum of transfer and the transfer was registered during the period of the first stay and in consequence the provision of s. 223 will not become operative at all. The chronology of the events have been well articulated in the judgment and learned counsel for the appellant has summarised it as follows:

5 May 2005	Letter of offer by respondent's agent to appellant offering land for sale.
29 June 2005	Appellant offer to purchase land at RM17,000 p.a.
8 July 2005	Respondent offers to sell land to appellant @ RM17,000 p.a., ie, total purchase price of RM12,087,000.
12 July 2005	Appellant accepts respondents offer.
13 July 2005	Appellant solicitors forward cheque for 5% of purchase price to respondent's solicitors.
8 Aug 2005	Respondent's solicitors forward four copies of SPA to appellant's solicitors for execution.

12 Aug 2005	Appellant's solicitors return four copies duly executed for SPA together with cheque for 25% of purchase price.	A
14 Oct 2005	Respondent's solicitors return to appellant's solicitors four sets of SPA duly executed.	
4 Jan 2006	Winding-up petition presented.	B
21 March 2006	Respondent's solicitors request for replacement cheques for 30% of purchase price as earlier cheques had expired.	
22 March 2006	Appellant's solicitors forward to respondent's solicitors two replacement cheques for 30% of purchase price in respondent's name.	C
28 March 2006	Respondent's request for the two replacement cheques be replaced. Again in favour of their solicitors.	D
3 April 2006	Appellant's solicitors tender replacement cheques.	
12 April 2006	SPA dated. Respondent changes solicitors from M/s Bahari & Bahari to M/s Abdul Halim Zairus (ALTZ) and direct payments to be made to ALTZ.	E
13 April 2006	Winding-up order against respondent's announcement to Bursa Malaysia that SPA executed on 12 April 2006.	F
21 April 2006	Appellant's solicitors wrote to respondent's solicitors enquiring about winding-up order and for confirmation of Liquidator/Official Receiver's sanction or consent to continue with the sale.	G
25 April 2006	Respondent's solicitors wrote to Department of Insolvency seeking their consent/sanction to continue and complete the sale.	
28 April 2006	Letter from Department of Insolvency to respondent's solicitors giving sanction and consenting to continue and complete the Sale and Purchase Agreement.	H
8 May 2006	Letter for respondent's solicitors forwarding Department of Insolvency's letter dated 28 April 2006 and asking for payment of RM3,626,100 into their client's account.	I

17 May 2006	Order of High Court granting a stay of the winding-up order until the disposal of the appeal by the Court of Appeal against the winding-up order. The Official Receiver attended and did not oppose the application. There was no appeal against this order.
29 May 2006	MOT executed by respondent in favour of the appellant.
5 June 2006	Director of Lands and Mines writes to respondent enclosing Johor Estate Land Board's approval for sale under s. 214(A) of National Land Code.
27 June 2006	Transfer registered in favour of appellant.
10 July 2006	Appellant remits balance purchase price to respondent's solicitors.
23 May 2007	Appointment of new Board of Directors of respondent.
20 Sept 2007	Respondent's appeal to Court of Appeal of winding-up order dismissed. Stay order set aside.
8 Aug 2008	High Court grants a permanent stay of the winding-up order.

(g) We have perused the judgment in detail and we note that the learned judge had omitted to deal with the first stay order and in consequence the integrity of the decision making process has been compromised on this issue and we agree with learned counsel for the appellant that the appellate intervention is necessary. Save for this issue we must say the judgment was sound in all aspect.

[21] For reasons stated above the appeal is allowed with costs. The order of the learned judge against the appellant is set aside and the order of the learned judge favouring the appellant's counterclaim is also set aside. The respondent to pay the appellant costs of RM50,000 here and below.

We hereby order so.